MIAMI REVIEW — MIAMI, FLORIDA

Supreme Court, U. S.
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in the Supreme Court of the United States

NO: 76-1319

BURLEIGH HOUSE CONDOMINIUM, INC.,
a non profit Florida corporation, on behalf of itself
and its membership,

Petitioner,

vs.

HERBERT BUCHWALD, individually and as trustee,
and BURLEIGH HOUSE, INC., a Florida corporation
for profit, individually, jointly and severally,

Respondents.

REPLY BRIEF OF PETITIONER

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STATEMENT

Petitioner respectfully differs with the statement of Respondents in certain particulars as follows:

Respondents represent in their statement that "the concept of selling condominium units subject to an existing

lease of recreation facilities devoted to the exclusive use of the unit owners is sanctioned by the legislature and the state courts."

The statement of respondents is not accurate since neither the courts or the legislature has "sanctioned" this device. In fact, the courts and legislature of the State of Florida has attempted to undo the problems created by the "loophole" which permitted developers to take unconscionable advantage of the explosive growth of condominiums throughout the United States, but without success.

Additionally, the State of Florida has recognized that it does not have the ability to cope with the problem presented by the explosive growth of condominiums in that state.

At page 3 of respondents' statement, respondents represent that "the rent for the use of the leased recreation facilities is paid proportionately by the unit owners as part of the common expenses."

The imposition of the proportionate cost of the leasehold as common expenses arises only because of the documentation utilized by the developers-lessors of condominiums, which imposed this obligation. Obviously this imposition is one of the results of the tying arrangement complained of in this case.

Also at Page 3 of their Statement, Respondents state that "the condominium is not the owner of a unit and has no property rights or ownership interest in any condominium property." This is also not the case, the Condo-

minium Association does have property rights in and to the Condominium property as is evidenced by Fla. Stat. 711 (now 718).

Respondents' statement at Page 3 also erroneously concludes that "when a unit owner sells his unit, he ceases to be a member of the Association and is completely released from all liability for payment of the common expenses."

In point of fact, a unit owner is responsible for damages to the lessor for any monies owed pursuant to the terms and conditions of the imposed 99 year leasehold. His damages are recoverable at law or by the exercise of lien rights against the dwelling unit.

Petitioner also respectfully differs with the conclusion of Respondents at Page 4 of the statement wherein respondents erroneously conclude that the original owner and developer of the Burleigh House Condominium made full disclosure of the nature, terms and extent of the lease providing recreation facilities, etc. and that each purchaser was furnished copies of the recorded condominium documents, including the recreation lease. This is simply not the case and at variance with the proof adduced at the limited trial of the cause below. In fact, deceptions were practiced against purchasers and this was generally the case in many condominium sales throughout the State of Florida.

On page 5 of the statement, by footnote, respondents erroneously conclude that it would not be possible to provide a swimming pool at a high rise apartment condominium without incurring the risk of a tying arrange-

ment. The conclusion is untenable and absurd on its face. There are many high rise or other dwelling units which contain swimming pools or other amenities which do not have tying arrangements. The essence of the tying arrangement is the imposition of a long term lease requiring the use of a tied product at exorbitant rental, which rental increases in proportion to any increase in cost of living.

Respondents erroneously conclude that the "mere existence of recreation facilities is an antitrust violation".

There are, of course, alternative ways to provide a swimming pool or other recreational facilities at a high rise dwelling, for example, the facilities could be included in the cash price for a dwelling unit, thereby permitting purchasers to ascertain the "true cost" of the facilities. (In any event, the evidence below clearly indicated that the cost of the facilities at the Burleigh House Condominium were included in the general cost of construction and were part of the one construction loan granted for the construction of the Burleigh House Condominium; in point of fact, petitioner proved that the lessor of the recreation facilities paid nothing for them and placed only minimum stamps on the deed of conveyance wherein he acquired title to the recreational facilities).

Additionally, if people wish to enter the recreational or swimming pool business, purchasers of dwelling units should not be compelled to contract for 99 years with constantly increasing yearly costs for the use of such facilities as a condition of purchase of the dwelling units. The conclusion is absurd.

At page 6 of Respondents' statement, the conclusion is attempted that the claims of *unit owners* were presented at the trial even though the Court ruled that they would not be permitted to join the action since the Condominium Association itself had standing to represent them. The two conclusions are apposite.

Nor does the record demonstrate that "the parties recognize that evidence in support of the claim of the unit owners constituting the membership of the Condominium Association had been presented at the trial for consideration by the jury and the Court". In the first instance, the case was not permitted to go to the jury since the Court directed a verdict in favor of defendants at the trial and, additionally, the Court of Appeals remanded sua sponte for dismissal on the issue of standing. None of the other issues were before the appellate court or this court.

As to the assertion of respondents that *Buckley Towers Condominium, Inc. vs. Buchwald*, 533 F.2d 934 (5th Cir. 1976), cert. den. (3 dissents), controls, a denial of certiorari does not establish precedence.

ARGUMENT

The antitrust plaintiff in this cause is a peculiar creature of law having been fashioned to meet the needs of an ever-changing society. It is a non-profit corporate entity with a vested property interest in the Burleigh House Condominium, a large self-contained dwelling complex larger in size than many communities in the United States. Far from being a conduit, the Burleigh House Community could not exist without the Condominium Association or a counterpart. The nature of the creation necessi-

tates the function. The Condominium Association may foreclose upon its vested property interest, (Fla. Stat. 718), lease or otherwise deal with the common elements and has vested property rights in the condominium creation by virtue of recorded documentation. The business of the Condominium Association is larger in dollar volume and extent than the majority of businesses in the United States. The members of the Burleigh House Condominium come from and continue to reside in many different states.

Daily in the State of Florida, thousands of citizens are investing millions of dollars in condominium property. *Sterling Village Condominium, Inc. vs. Breitentach*, 251 So.2d 685 (Fla.App. 1971), at 688. The Condominium Association is a vehicle which controls the vested rights of all unit owners and the property rights of the Condominium Association itself. *Sterling Village, supra*, Fla.Stat. 718. Thus, by law, contract and recorded documentation, Burleigh House Condominium, Inc., as every other condominium, does have vested property interests in the condominium itself in addition to its sole responsibility for the management, budgeting, repair, maintenance, enforcement of covenants, etc. at the Condominium Association.

The Association and its members are irrevocably wed by law and privity. Respondents' desire to *utilize* this symbiotic relationship to *enforce* the unwanted recreational lease agreement on the one hand, but *disaffirm* it for purposes of *standing*, is untenable. The injury in the instant case is all pervading.

Respondent has raised *Simon vs. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450, for the proposition that standing should

be denied in this case. If anything, *Simon* points out the necessity for granting a condominium association standing in the instant case.

Simon, supra, pointed out that " . . . the standing question in its Art. 3 aspect 'is whether the Plaintiff has alleged such a personal stake in the outcome of the controversy, to warrant his invocation of Federal Court jurisdiction and to justify exercise of the Court's remedial powers on his behalf.' " *Warth vs. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343.

When a Plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the Plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. It is axiomatic in this case that a favorable decision on behalf of the Condominium Association itself would terminate the illegal tying arrangement and obtain the relief to end the illegal restraint of trade. One injunction is as good as one thousand injunctions. A recovery by the Corporate Condominium Association would inure to the benefit of the membership. Actual injury of a continuing nature was alleged and exists. Standing requirements are met.

Respondents additionally cite *Pacific Coast Agricultural Export Association, etc. vs. Sunkist Growers, Inc.*, 526 F.2d 1196, (9th Cir. 1975), cert. den. 425 U.S. 959, 96 S.Ct. 174. The simple answer to *Sunkist, supra*, is that membership in the Plaintiff was not compulsory or mandatory nor were the interests asserted by the Plaintiff on behalf of its members necessarily identical. In the instant case, a favorable decision for the Condominium Association would resolve the problem and there would be no

danger of multiple litigation. If standing is denied, it is conceivable that each and every member could and would be compelled to, bring an individual action for relief thus exposing the Defendants to a myriad of subsequent suits.

There is no dispute that the contractual arrangements imposing the allegedly illegal tying arrangement on Plaintiff and its membership which was recorded in the official records of Dade County, Florida applies equally to all unit owners. The evil is inherent in the *contract*. Additionally, Plaintiff is the lessee. (The contractual arrangements were conceived, drafted, executed and recorded during the time when the Respondents in this cause completely controlled, through designees, the interest and affairs of the Burleigh House Condominium Association, a device which permitted the Respondents in this cause to dictate the terms and conditions of the contractual arrangements without the necessity of any arms-length dealings or any voice in opposition by any unit owner; thereafter, these documents were recorded and imposed upon all unit owners-members of the Burleigh House Condominium Association. By this device, the Respondents were able to circumvent all rules of fair play and avoid the competition of the market place.)

Buckley Towers Condominium, Inc., vs. Buchwald, 533 F.2d 934 (5th Cir. 1976) cert. den. — U.S. — 97 S.Ct. 1157, 51 L.Ed.2d 571 (3 dissents) presented the standing problem to this Court for the first time. The arguments advanced in *Buckley, supra*, were compelling enough to raise substantial questions inherent in the Condominium form of home ownership. *Burleigh*, gives this Court an opportunity to reexamine the question of standing and resolve the disorder and conflict now prevalent in this area

of law by determining whether or not a Condominium Association, which is a party to the illegal contract complained of and is vested with property interest in the Condominium itself, has sufficient standing, by virtue of its property interest in the leasehold contract and condominium, in addition to the other compelling reasons, to assert standing on behalf of itself and its unit owners for relief from anti-trust violations. If this petition is granted, briefs amicus curiae might be invited on the question.

If the Court declines to review this cause on that question, it is respectfully requested that the cause be remanded to the United States District Court for the Southern District of Florida to permit the joinder of such parties as, in the view of this Court would be the proper parties to the action.

CONCLUSION

In conclusion, this Court is asked to assume jurisdiction of this cause because of the great interest and far-reaching consequences of the question presented in this cause occasioned by the explosive growth of the Condominium form of housing throughout the United States.

Respectfully submitted:

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By: /s/ Joseph S. Paglino

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CERTIFICATION

IT IS HEREBY CERTIFIED that a true copy of the foregoing was mailed this 16th day of June, 1977 to Darrey A. Davis, Esq., Steel Hector & Davis, 1400 S. E. First National Bank Building, Miami, Florida 33131, attorney for Respondents.

By: /s/ Joseph S. Paglino

Joseph S. Paglino, Esq.